**Colorado Symphony Association *and* Denver Musicians Association, Local 20-623, American Federation of Musicians.** Case 27–CA–195026

April 13, 2018

DECISION AND ORDER

BY CHAIRMAN KAPLAN AND MEMBERS PEARCE AND EMANUEL

On November 20, 2017, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Colorado Symphony Association, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 13, 2018

Marvin E. Kaplan, Chairman

Mark Gaston Pearce, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Angie Berens, Esq.,* for the General Counsel.
*Patrick R. Scully* and *Beth Ann Lennon, Esqs. (Sherman & Howard LLC),* for the Respondent Symphony.
*Joseph M. Goldhammer, Esq. (Rosenblatt & Gosch, PLLC),* for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. The complaint in this case alleges that the Colorado Symphony has unlawfully refused to provide Denver Musicians Local 20-623 with certain relevant and necessary information; specifically, copies of the individual "overscale" contracts the Symphony executed with its principal wind and brass players for the previous three seasons. The Symphony admits that it refused to provide the information to the Union, but denies that the refusal was unlawful. It asserts that the Union requested the overscale contracts to assist the principal flutist with her personal EEOC sex-discrimination/equal-pay case against the Symphony rather than for any legitimate collective-bargaining purpose. It also asserts various other defenses, including that the overscale contracts are confidential.[1]

I. THE RELEVANT FACTS[2]

Local 20-623 has been the recognized collective-bargaining representative of the Symphony's musicians since at least 1990. The Union and the Symphony have reached successive collective-bargaining agreements since that time, the most recent of which was effective from July 1, 2013 through June 30, 2015. Like the prior agreements, the 2013–2015 collective-bargaining agreement (CBA) establishes a base weekly salary for the musicians and certain other terms and conditions of employment. However, article 16 the CBA authorizes the Symphony and individual musicians to negotiate and enter into "overscale" contracts on an annual basis that provide a higher salary and other more favorable terms and conditions of employment than specified in the CBA. The Symphony has negotiated and exe-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing the Union's request to furnish copies of the individual overscale contracts of bargaining-unit musicians in the symphony's brass and woodwind sections, Chairman Kaplan and Member Emanuel find it unnecessary to decide whether, in the absence of alleged gender discrimination in pay, the Union would have been entitled to the overscale contracts solely for the purpose of helping employee Brook Ferguson or other employees in their individual negotiations. Member Pearce would find the overscale contracts presumptively relevant even in the absence of a wage discrimination concern. *King Broadcasting Co.*, 324 NLRB 332, 336–337 (1997).

[1] There is no dispute, and the record establishes, that the Board has jurisdiction.

[2] Citations to the record are included to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), cert. denied 522 U.S. 948 (1997).

cuted such individual overscale contracts with many of the musicians, including every principal and second and third chair.[3]

At no time prior to the relevant events here has the Union participated in such individual overscale-contract negotiations. Article 16 states that "[the Symphony] or the musician shall give written notice to the other" by February 1 if changes in an individual overscale contract are desired for the following contract year, and "[the Symphony] and the musician shall meet and negotiate in good faith in an effort to reach agreement." There is no mention in article 16 of the Union's direct participation, and the Union has never sought to directly participate, in the individual negotiations. Nor has the Union ever indirectly participated. Although article 16 does not expressly prohibit the Union from assisting a musician with his/her individual negotiations, the Union has never done so.

The Union has also never filed or assisted with a grievance under article 16 regarding the individual overscale contracts. Article 16 indicates that only a tenured musician may file a grievance regarding his/her individual contract, and only if the Symphony's offer is less favorable than the tenured musician's current contract. Although article 19 of the CBA (Grievance and Arbitration) states that the Union must be involved in the initial discussion of such a grievance, and that only the Union may demand arbitration, no such grievance has apparently ever been filed.

Nor has the Union ever filed or assisted with a grievance relating to the overscale contracts under any other article of the CBA. There is no provision in the CBA prohibiting the Symphony from engaging in race and sex discrimination or requiring it to comply with federal and state laws generally.

The Union also has not raised any issue regarding the individual overscale contracts during the parties' negotiations over a new collective-bargaining agreement. Although the parties have been engaged in such negotiations since 2015, neither side has proposed any changes to article 16. Nor has the Union proposed adding a nondiscrimination provision or any other provision that might provide a basis for grieving inequities between contracts.

Finally, the Union has never requested a copy of any individual overscale contract prior to the relevant events here. And there is no evidence that the Symphony has ever provided the Union with a copy.

However, in November 2016, for the first time, one of the musicians—Principal Flutist Brook Ferguson—complained to the Union about her individual contract negotiations with the Symphony. Ferguson believed that she was underpaid compared to male musicians in similar positions, and had been trying to negotiate a more favorable overscale contract with the Symphony since late 2015. She had even retained her personal attorney to assist in the negotiations. The attorney had written several letters on her behalf to the Symphony's personnel manager or attorney between February and September 2016. The letters asserted that Ferguson's overscale had averaged 28 percent less over the last six seasons than the overscale of her principal male counterparts, including the principal French horn and principal bassoonist ("only two of the many examples [she] is prepared to evidence"); that the Symphony's counteroffers to Ferguson, the last of which "was less than the principal oboe/horn and only mildly in line with the principal bassoonist," were therefore "unfair and discriminatory"; and that Ferguson would be "forced to pursue her remedies at law" if this and other workplace issues she had raised with the Symphony were not resolved. (R. Exhs. 2, 4, 5; and Tr. 118, 156.)

Ferguson informed the Union's president, Michael Allen, and its attorney, Joseph Goldhammer, of this history at a meeting with them on November 14, 2016. The purpose of the meeting was to discuss an unrelated workplace incident involving her and a male associate conductor. The Symphony had asked Ferguson to meet with management a few days hence to address it. Ferguson believed the incident reflected or evidenced the unfair and discriminatory treatment she had received, and mentioned her unsuccessful individual contract negotiations with the Symphony in that context. She did not go into detail, but generally informed Allen and Goldhammer of her offer and the Symphony's counteroffer; her belief that the Symphony's counteroffer was unfair and discriminatory; and that she was considering filing a charge against the Symphony with the Equal Employment Opportunity Commission (EEOC). She asked if the Union could help her. (Tr. 50, 65, 145–148, 153–154.)

Goldhammer replied that the Union could not represent her with respect to any Title VII or other statutory discrimination claims she might file with the EEOC. However, both he and Allen indicated that the Union could look into whether she was being treated unfairly or inequitably by the Symphony. Allen said the union pension plan would provide some information about what other musicians were being paid, but the information would not be sufficient for various reasons. Goldhammer said if the Union did not have good data on whether Ferguson was being treated unfairly or inequitably, it should request the information from the Symphony. (Tr. 45–49, 51, 61.)

Approximately 7 weeks later, on January 4, 2017, Goldhammer emailed the subject information request to the Symphony.[4] Goldhammer requested that the Symphony provide the Union with "copies of the individual contracts executed between [the Symphony] and all principal wind and brass players for the 2014/15, 2015/16, and 2016/17 seasons" and that it do so "within 20 days." (Jt. Exh. 2.)

The Symphony's attorney, Patrick Scully, emailed Goldhammer back a few hours later and asked him to explain the relevance of the request. Scully reminded Goldhammer that the Union had "agreed that [the Symphony] has the right to deal

[3] Tr. 107, 122. A "principal position" is defined in art. 3.1.C(1) of the CBA as "the first chair position in each of the following sections": "first violin, second violin, viola, cello, double bass, flute, oboe, clarinet, bassoon, horn, trumpet, trombone, tuba, tympani, percussion, and harp."

[4] The record contains no explanation for the 7-week delay. There is no evidence of any further discussions about the matter between the Union and Ferguson, or between the Union and the Symphony, between the November 2016 meeting and the January 2017 information request.

directly with musicians and arrive at individual contracts." Shortly thereafter, Jerome Kern, the Symphony's CEO and Co-Chair of the Board of Trustees, likewise emailed Goldhammer and asked him to also provide the legal basis for the Union's belief that it had the right to the information. (Jt. Exh. 3.)

Goldhammer emailed the following reply on January 9:

> An employer's obligation to bargain in good faith includes the duty to furnish relevant information upon request. *NLRB v. Truitt Mfg. Co*., 351 U.S.149, 156 (1956); *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967). The wages of bargaining unit employees contained in the requested individual contracts are "presumptively relevant," since they are data "bearing directly on a mandatory bargaining subject." *Detroit News*, 270 NLRB 380 (1984). In that case as in this one, the collective bargaining agreement allowed the employer to negotiate with employees rates of pay above the minimums set forth in the contract. The Board required as a part of the employer's obligation to bargain in good faith that it disclose the total wages of all bargaining unit employees to the union, including those of one employee who objected to the revelation of his overscale to the union.
>
> Further, the Board in *Detroit News* pointed out that wage information should be made available without regard to its immediate relationship to the agreement or to its precise relevancy to particular bargaining issues. The Courts have upheld NLRB orders requiring the production of wage information based upon general grounds, such as that the information is relevant to potential wage inequities and the policing and administration of the contract. *NLRB v. Leland-Gifford Co.*, 200 F.2d 620 (1st Cir. 1952). Accordingly, in answer to your email of January 4, 2017, the [Union's] request of January 4, 2017, is relevant to potential wage inequities and the policing and administration of the contract or those provisions which remain in effect after expiration at least until impasse.
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> The Board has followed its holding in *Detroit News* and has never reversed it. See, e.g., *King Broadcasting*, 324 NLRB 332 (1997) (Employer must disclose to the union personal services contracts negotiated with individual employees which contain more favorable terms for the employee than those in the CBA, notwithstanding the fact that the union does not participate in the negotiation of overscale). Furthermore, the Board's requirement that employers produce individual contracts containing more favorable terms than those required in the CBA has met with affirmation in the Courts of Appeals. See, e.g., *Retlaw Broadcasting v. NLRB*, 172 F.3d 660 (9th Cir. 1999). [Jt. Exh. 4.]

Scully emailed the Symphony's response a week later, on January 16. He asserted that the Union had "waived all bargaining rights" with respect to individual overscale contracts, citing *KFMB Stations*, 343 NLRB 748, 752 (2004), a case where the parties' expired collective-bargaining agreement likewise explicitly authorized the employer to directly negotiate individual above-scale contracts with unit employees. Further, he accused the Union of requesting the information "at the behest of" Ferguson, who had "threatened to initiate litigation against [the Symphony] via correspondence from her attorney." He asserted that it "appears beyond cavil that [Ferguson] seeks the requested information solely for the purpose of pursuing litigation against [the Symphony]," and that the Union was seeking the requested information "solely to further [her] unsubstantiated claims against [the Symphony]." He stated that this was "improper," citing *Unbelievable, Inc.*, 318 NLRB 857, 861, 877 (1995) ("even if the material would be producible for collective-bargaining, it is not producible as a substitute for discovery"); and *Union-Tribune Publishing Co*., 307 NLRB 25, 26 (1992) (if information is sought relating to a pending charge, the Board will not find an 8(a)(5) violation if the employer refuses to provide the information.). Accordingly, he advised that the Symphony was "reject[ing]" the Union's information request "absent further information establishing a lawful basis for [it]." (Jt. Exh. 5.)

Ferguson filed her initial charge against the Symphony with the EEOC 2 days later, on January 18. She filed the charge on her own, without the assistance of either her personal attorney or the Union. She alleged that the Symphony had been paying her less than her male colleagues on the principal woodwind block since she started with the Symphony in 2010; that the Symphony's most-recent final offer in 2016 did not bring her up to the level of her male peers and was conditioned on waiving her legal equal-pay claims; and that she believed the Symphony was discriminating against her because of her sex in violation of Title VII of the Civil Rights Act and the Equal Pay Act. (R. Exh. 3; Tr. 51, 142–143, 154–155.)

The following month, on March 17, the Union filed the instant unfair labor practice charge with the NLRB's Denver regional office. The charge alleged that, by refusing to provide the requested individual overscale contracts to the Union, the Symphony had violated its duty to bargain in good faith under Section 8(a)(5) and (1) of the National Labor Relations Act (GC Exh. 1(a)).

Approximately 2 months later, on May 15, Scully called Goldhammer to discuss the matter. He informed Goldhammer that Ferguson had, in fact, filed an EEOC charge against the Symphony. He told Goldhammer that the charge was untrue; that the Symphony was not discriminating against her based on her gender or sex. Goldhammer responded that, while Ferguson was "the instigation of" the Union's information request, the request was for the benefit of all the unit musicians. He said the Union had an interest in making sure all the musicians were being treated equitably, even though they bargained their overscale rates on an individual basis, and believed that all the musicians should have access to such information when they negotiate their individual contracts. He told Scully the Union was therefore resolved to continue seeking the requested information pursuant to its pending unfair labor practice charge. (Tr. 59–60)

At some point around this time, Symphony CEO Kern also contacted the Union's Orchestra Committee about the Union's information request. The Orchestra Committee is a group of five tenured contract musicians elected by Orchestra members to serve as an agent of the Union in administering the CBA and

a liaison between the musicians and the Union (Jt. Exh. 1, p. 27). The Committee subsequently advised Kern that the musicians did not want the Symphony to disclose the individual contracts to the Union.[5]

In the meantime, on June 27, Ferguson amended her initial EEOC charge to additionally allege that the Symphony had disciplined her in November 2016 in a manner inconsistent with that of her male colleagues. She also specifically objected in the amended charge to Kern contacting the Orchestra Committee about the Union's information request. She asserted that it was a "sensitive legal information request"; that Kern was "fully aware that the information request had to do with [her] allegations of discrimination"; and that Kern's "inappropriate disclosure resulted in the entire ensemble being notified of the information request via email which created much unrest among the musicians and imperiled [her] professional reputation and right to privacy." (R. Exh. 1.)

About 3 weeks later, on July 17, the Regional Director issued a formal complaint on the Union's unfair labor practice charge. A hearing on the complaint was held on September 19, and each of the parties—the General Counsel, the Union, and the Symphony—filed briefs on October 24.[6]

## II. LEGAL ANALYSIS

As indicated in the Union's January 9 response to the Symphony, information regarding the wages of unit employees is presumptively relevant and necessary for a union to perform its statutory collective-bargaining duties. This includes overscale wages that individual unit employees have negotiated directly with the employer pursuant to provisions of the collective-bargaining agreement authorizing such individual overscale negotiations. Thus, overscale wage information must be furnished to a union on request unless the employer presents evidence of additional facts or circumstances sufficient to rebut the presumption of relevance. *Retlaw Broadcasting Co.*, 324 NLRB 138, 141 (1997), enfd. 172 F.3d 660 (9th Cir. 1999); *King Broadcasting Co.*, 324 NLRB 332, 336–337 (1997); *WXRK*, 300 NLRB 633, 635–636 (1990); *WCCO Radio*, 282 NLRB 1199, 1204 (1987), enfd. 844 F.2d 511 (8th Cir.), cert. denied 488 U.S. 824 (1988); *Detroit News*, 270 NLRB 380, 381–382 (1984), enfd. mem. 759 F.2d 959 (D.C. Cir. 1985); and *Radio Station WLOL*, 181 NLRB 560, 561 (1970).[7]

The Symphony has failed to present any such facts or circumstances here. The Symphony argues that the evidence "conclusively demonstrates" that the Union requested the individual overscale contracts, not for any legitimate purpose related to the Union's collective-bargaining duties and responsibilities, but solely to obtain evidence for Ferguson's EEOC sex-discrimination/equal-pay case against the Symphony. However, there are several problems with this argument.

First, as indicated by the General Counsel and the Union,[8] it is well established that investigating possible employer race or sex discrimination is a legitimate purpose related to a union's collective-bargaining duties and responsibilities. Indeed, a union has a duty to investigate and take action to eliminate such discrimination. As the Board stated in *Westinghouse Electric*,

> Regardless of the existence of an antidiscrimination clause in a collective-bargaining agreement, the very nature of the collective-bargaining representative's status as representative of *all* unit employees imposes on it a legal obligation to the employees it represents to represent them with due diligence. This duty of fair representation requires it to represent fairly and in good faith the interests of minorities within the unit. The Board has stated that a union's refusal to process grievances against racial discrimination, in violation of that duty, is an unfair labor practice. For breach of its duty of fair representation the union may be liable in a suit for damages,https://1.next.westlaw.com/Document/I14e871a7fac511dab3be92e40de4b42f/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.DocLink)&userEnteredCitation=239+nlrb+106 - co_tablefootnoteblock_18 subject to injunction, or have its certification of representative revoked. Passive ignorance will not relieve a union of its duty (*Vaca v. Sipes*, [386 U.S. 171 (1967)]), and, if a discriminatory scheme exists, a union has been required to propose specific contractual provisions to prohibit racial discrimination in terms and conditions of employment, and bargain in good faith to obtain such provisions in a written contract. Since the cases have plainly established that a union has a right to protect the em-

[5] See Tr. 117. The Symphony's posthearing brief also cites emails or letters from the Orchestra Committee to the Symphony and the Union in July and August 2017, which the Symphony attached to its September 14 opposition to the Union's petition to revoke its subpoena duces tecum in this proceeding (GC Exh. 1(o), attachments A, B). However, the Symphony's opposition, including the attached emails, were submitted into evidence by the General Counsel as part of the formal papers in the case, i.e. the charge, complaint, answer, motions, etc. (Tr. 5–6). It is well established that such formal papers are offered and received as merely procedural documents. See, e.g., *Dynatron/Bondo Corp.*, 324 NLRB 572 fn. 5 (1997), enfd. in part and denied in part 176 F.3d 1310 (11th Cir. 1999). Thus, they generally do not constitute substantive evidence unless they contain an admission. The Symphony's experienced counsel knew this, and therefore proposed a stipulation that they could be cited as substantive evidence. However, the proposed stipulation was rejected. (Tr. 18–19.) Further, a ruling was specifically reserved on whether the emails could be admitted as substantive evidence until they were offered by the Symphony as such (Tr. 21). Yet, the Symphony never thereafter moved to admit the emails as substantive evidence. See also Tr. 87–93. Accordingly, the emails have not been considered as substantive evidence in support of the Symphony's arguments or defenses in this proceeding.

[6] The General Counsel also filed an unopposed motion to correct the transcript. The motion is granted. As noted in the Symphony's brief, there are also other instances, not listed in the General Counsel's motion, where the transcript misidentifies the individual speaking.

[7] Thus, contrary to the Symphony's brief (p. 7–8), it was not the Union's burden to show the specific or precise relevance of the overscale contracts to its collective-bargaining duties and responsibilities. See also *Columbia Memorial Hospital*, 363 NLRB No. 4, slip op. at 8 (2015) (information concerning unit employees' terms and conditions of employment "is presumptively relevant and must be furnished on request, without need by the [union] to establish specific relevance or particular necessity"); and *Matthews Readymix, Inc.*, 324 NLRB 1005, 1009 (1997) ("[A] union is not required to prove the precise relevance of [presumptively relevant] information unless the [employer] submits evidence sufficient to rebut the presumption of relevance."), enf. denied on other grounds 165 F.3d 74 (D.C. Cir. 1999).

[8] See Tr. 28; GC Br. 11–12; and Union Br. 13.

> ployees it represents from discriminatory treatment by an employer, it follows that a union needs information related to race and sex in order to make proposals and then to take other action to correct such discrimination.

239 NLRB 106, 108 (1978) (footnotes omitted), enfd. as modified sub nom. *Electrical Workers v. NLRB*, 648 F.2d 18 (D.C. Cir. 1980), modified on rehearing per curiam 1981 WL 27197 (D.C. Cir. Jan. 22, 1981).

Here, as indicated above, the expired CBA does not contain an antidiscrimination clause or any other provision that might support a grievance against the Symphony for discriminating against Ferguson on the basis of her sex. However, the Symphony and the Union were engaged in ongoing negotiations for a new collective-bargaining agreement at the time the Union learned that the Symphony might be discriminating against Ferguson. Thus, as indicated in *Westinghouse Electric*, if the requested overscale contracts of the principal wind and brass players supported Ferguson's allegations, consistent with its duty of fair representation the Union could have proposed that a nondiscrimination provision be included in the new agreement. Assuming the provision was agreed to, the Union could have also filed a grievance to enforce that provision if there were grounds to believe the Symphony was violating it.

Second, contrary to the Symphony's contention, there is insufficient evidence that the Union requested the overscale contracts solely to provide Ferguson with evidence to support her EEOC case. Ferguson had not even filed an EEOC charge at the time of the Union's information request. And while she informed Goldhammer and Allen that she was considering filing an EEOC charge, there is no evidence that she asked them to request the individual contracts for her EEOC case or that they offered to do so. Indeed, Goldhammer credibly testified that he told Ferguson the Union could not represent her with respect to any such EEOC case, and that the Union did not, in fact, help Ferguson with her case. Further, neither he nor Allen ever advised the Symphony that the Union was requesting the information for Ferguson's EEOC case. Goldhammer's May 15 statement to Scully simply confirmed that Ferguson was "the instigation of" the Union's information request. Similarly, Ferguson's subsequent June 27 amended EEOC charge merely stated that the information request "had to do with [her] allegations of discrimination."

Thus, at most, the record evidence indicates that the Union was aware that the requested information might also be used by Ferguson to support an EEOC charge against the Symphony (again, assuming it corroborated the information she already had).[9] This is clearly an insufficient basis to rebut the presumption of relevance. See *Westinghouse Electric* 239 NLRB at 110–111 ("If information is relevant to collective bargaining, it loses neither its relevance nor its availability merely because a union additionally might or intends to use it to attempt to enforce statutory and contractual rights before an arbitrator, the Board, or a court.") Accord: *Dover Hospitality Services, Inc*., 358 NLRB 710 (2012) (employer was obligated to provide relevant financial information to the union during collective-bargaining negotiations notwithstanding a pending lawsuit filed by affiliated benefit funds against the employer), reaffd. 361 NLRB 682 (2014), enfd. 636 Fed. Appx. 826 (2d Cir. 2016). See also *Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 14 (2016); *Ralph's Grocery Co*., 352 NLRB 135 (2008), reaffd. 355 NLRB 1279 (2010); *Country Ford Trucks, Inc.,* 330 NLRB 328 fn. 6 (1999), enfd. 229 F.3d 1184, 1192 (D.C. Cir. 2000); *AK Steel Corp.,* 324 NLRB 173, 184 (1997); *Central Manor Home for Adults,* 320 NLRB 1009, 1011 (1996); and *Associated General Contractors of California*, 242 NLRB 891, 894 (1979), enfd. in relevant part 633 F.2d 766 (9th Cir. 1980), cert. denied 101 S.Ct. 3049 (1981) and cases cited there (employer must provide requested information that is presumptively relevant or has been shown to be relevant to the union's collective-bargaining duties, even if the union also has other reasons for requesting the information or the information may be used for other purposes).

Third, the various "discovery device" cases cited by the Symphony in support of its argument are clearly distinguishable. For example, in *Southern California Gas Co*, 342 NLRB 613 (2004), the primary case the Symphony relies on, the union specifically advised the employer that it wanted the requested work-order information for purposes of its pending safety complaint before a state commission; the requested information was not presumptively relevant to the union's collective-bargaining duties; and the union failed to show that it was relevant under the particular circumstances. Here, as discussed above, the Union never asserted that the overscale wage contracts were being requested for an EEOC charge; the requested overscale wage contracts were presumptively relevant; and the Union therefore had no burden to show their specific or precise relevance.[10]

Cases such as *WXON-TV, Inc*., 289 NLRB 615, 617–618 (1988), *Union-Tribune Publishing Co*., 307 NLRB 25, 26 (1992), and *Unbelievable, Inc.*, 318 NLRB 857, 861, 877 (1995), are also inapposite. In those cases the unions requested the subject information the very same day or after they filed related unfair labor practice charges with the Board itself, which does not permit prehearing discovery in unfair labor practice proceedings. Nothing like that occurred here.

The Symphony's various other arguments likewise lack merit. For example, the Symphony argues that the Union never stated that it needed the requested overscale contracts for purposes of the ongoing collective-bargaining negotiations. However, as indicated above, a union is not required to specify why it needs information that is presumptively relevant to collective-bargaining. Further, the Union never stated that it did *not* want the requested information for purposes of the ongoing

[9] It is unclear where Ferguson obtained the information described in her attorney's correspondence about what her male counterparts were being paid. She may have simply been told by other musicians what they were being paid. See CEO Kern's testimony, Tr. 128–129 (the musicians "all talk to each other" about what they are getting paid).

[10] See fn. 7 above. See also *Kentile Floors, Inc*., 242 NLRB 755, 756–757 (1979) (holding, based on *Westinghouse Electric*, supra, that wage data to determine whether existing provisions in the collective-bargaining agreement tend to perpetuate discrimination or frustrate equal opportunity is presumptively relevant, and that a union is therefore entitled to such information without a specific demonstration of the relationship of the information to the union's bargaining function).

collective-bargaining negotiations. Goldhammer's January 9 response to the Symphony generally stated that the requested information was "relevant to potential wage inequities and the policing and administration of the contract," citing *NLRB v. Leland-Gifford Co.*, 200 F.2d 620 (1st Cir. 1952). Like here, *Leland-Gifford* is a case where the union requested wage information during the parties' ongoing negotiations over a new collective-bargaining agreement because of concerns about possible wage "inequities." Further, the Board's decision, which the court affirmed, specifically found that the information "was relevant to that subject in connection with contract negotiations as well as the policing of the administration of any contract." 95 NLRB 1306, 1310 (1951). Thus, Goldhammer's January 9 response cannot reasonably be construed as an admission that the requested information had no relevance to the parties' ongoing negotiations.[11]

Goldhammer's subsequent May 15 conversation with Scully likewise did not contain an admission that the information request had no relevance to the parties' ongoing negotiations. As indicated above, Goldhammer advised Scully that Ferguson was "the instigation of" the Union's information request, but that the Union had an interest in making sure all the musicians were being treated equitably, and believed that all the musicians should have access to such information when they negotiate their individual contracts. Goldhammer gave a similar explanation for the Union's information request at the September 19 hearing, testifying that the request was "driven in part" by Ferguson; that the information was requested to investigate whether there were wage inequities; that one of the motivations for the information request was to help Ferguson with her individual overscale negotiations, but that the Union represented all of the members of the bargaining unit; and that any information received from the Symphony would be made available to all of them (Tr. 64, 71). Again, although these general explanations do not explicitly state that the Union would use the information to make antidiscrimination proposals at the bargaining table, they cannot reasonably be construed as an admission that the information would not be used for that purpose.

The Symphony also argues that the Union never actually made any bargaining proposals related to the requested overscale information during the ongoing negotiations. However, as the Union never received the requested overscale information, it is neither surprising nor a defense that the Union did not make any bargaining proposals related to it. See *Retlaw Broadcasting*, 324 NLRB at 142 ("'the union cannot decide what role it will seek to play until it obtains concrete, adequate information'"), quoting *Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129 (4th Cir. 1979); and *NLRB v. Postal Service*, 18 F.3d 1089, 1100–1101 (3d Cir. 1994) ("a union may be entitled to information [probative of discrimination] before it has made a bargaining demand"). See also *Bendix Corp*., 242 NLRB 1005, 1008–1009 (1979).

The Symphony also argues that provisions such as article 16, which authorize an employer to deal directly with individual employees regarding overscale wages, are a nonmandatory subject of bargaining,[12] and that an employer has no duty to provide a union with information concerning a nonmandatory subject.[13] However, as indicated above, the Board in *Retlaw Broadcasting* and other similar cases has held that overscale contracts are nevertheless presumptively relevant and that an employer must therefore provide them to the union on request notwithstanding that they were negotiated directly with employees pursuant to such provisions. The Board's primary rationale for doing so is that wages "go to the core of the employer-employee relationship," and a union is therefore entitled to know what the individual overscale wages are "without regard to [their] immediate relationship to the negotiation or administration of the collective-bargaining agreement." *Retlaw Broadcasting*, 324 NLRB at 141.

Moreover, the Union never asserted that it wanted to bargain over article 16. Rather, Goldhammer's January 9 response to the Symphony generally stated that the requested overscale contracts of the principal wind and brass musicians were relevant to "potential wage inequities"—by which the Union meant, and which the Symphony understood to mean, that the Union was investigating whether there was any validity to Ferguson's allegations that the Symphony had offered her lower overscale wages than her principal male counterparts because of her sex. It is well-established that the elimination of race and sex discrimination is a mandatory subject of bargaining. See *Southwestern Bell Telephone Co*., 247 NLRB 171, 173 (1980); and *Electrical Workers v. NLRB*, 648 F.2d at 24 fn. 6, and cases cited there. A union may therefore be entitled to information that is relevant and necessary to determining whether a particular employment action is discriminatory, even if the employment action itself is not a mandatory subject. See *Star Tribune*, 295 NLRB 543, 548–549 (1989) (holding that the employer was required to provide the union with information concerning preemployment drug testing, notwithstanding that such testing is a nonmandatory subject of bargaining, because the union requested the information pursuant to a pending grievance alleging that the employer's implementation of the testing program violated the nondiscrimination provisions of the collective-bargaining agreement), and cases cited there.

The Symphony also argues that the Union waived any right to request the overscale information. However, a waiver of collective-bargaining rights must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). By its terms, article 16 only waives the Union's right to bargain collectively with the Symphony regarding the individual overscale wages of the musicians. It says nothing about the Union's right, under *Retlaw Broadcasting* et al. and *Westinghouse Electric*, to be informed of the overscale wages of the musicians for other purposes consistent with the Union's statutory duties and responsibilities relating to the negotiation, administration, and enforcement of a collective-bargaining agreement. Nor is there

[11] Goldhammer testified that he does not himself participate in the collective-bargaining sessions (Tr. 60), and that he used general terms in describing the relevance of the Union's information request "because I normally try to keep strategy away from my opposing counsel if I can make the legal request using more general terms" (Tr. 66).

[12] See *Retlaw Broadcasting*, 324 NLRB at 143–145. See also *KFMB Stations*, 343 NLRB 748 (2004), and 349 NLRB 373 (2007).

[13] See *Pieper Electric, Inc*., 339 NLRB 1232, 1235 (2003).

any other provision in the expired CBA addressing the Union's right to know the overscale wages of the musicians. Thus, contrary to the Symphony's contention, the CBA does not waive the Union's right to that information. See *King Broadcasting*, 324 NLRB at 337 ("Silence in the collective-bargaining agreement on the issue of whether [unredacted overscale contracts] shall be provided to the Union will not constitute a clear and unmistakable waiver."). See also *WCCO Radio*, 282 NLRB at 1204–1205; and *Radio Station WLOL*, 181 NLRB at 562.[14]

Waiver also cannot be inferred here from the parties' history. The Board does not lightly infer waiver based on past practice. See *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4 fn. 9 (2015); and *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). See also *General Motors Corp. v. NLRB*, 700 F.2d 1083, 1089 (6th Cir. 1983) ("the fact that the Union has not historically fully exercised its statutory right to information does not defeat that right contemporarily nor does it constructively constitute a waiver *ad infinitum*"). Thus, for example, in *Radio Station WLOL*, the Board found no waiver even though in the previous two contract negotiations the union had either not requested the individual wage data or had abandoned its request after the employer denied it. 181 NLRB at 561–562. Here, although there is no evidence that the Union had ever requested or been provided any overscale contracts before, there is no evidence it ever had reason to request them or that the matter had ever been discussed. Cf. *Leonard B. Hebert, Jr.*, 259 NLRB 881 (1981) (finding that the employer was required to provide the union with information regarding whether the employer was running a double-breasted operation, notwithstanding that the union had never requested such information before, as the union had recently learned of the possible existence of such an operation), enfd. 696 F.2d 1120 (5th Cir), cert. denied 464 U.S. 817 (1983).

Finally, the Symphony argues that the overscale contracts are confidential, citing the fact that the Orchestra Committee told Symphony CEO Kern that the musicians did not want their contracts disclosed to the Union. However, there are several problems with this argument as well. First, the record indicates that the Orchestra Committee did not tell Kern this until long after the Symphony denied the Union's request for the contracts. Second, there is no evidence that the musicians were promised confidentiality at the time they executed the contracts. Third, the Board has repeatedly held that a union's right to such overscale wage information outweighs individual employee confidentiality and privacy interests. See *Retlaw Broadcasting*, 324 NLRB at 138 n. 1, and cases cited there. Fourth, if the Symphony was concerned about the confidentiality of the information, it was obligated to propose and bargain over a reasonable accommodation, such as redacting the information and/or restricting its use. See *A-1 Door & Building Solutions,* 356 NLRB 499, 500–501 (2011); and *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). See also *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20–21 (D.C. Cir. 1998), and cases cited there. There is no evidence that it ever did so.

Accordingly, the Symphony's refusal to provide the Union with the requested individual overscale contracts of the principal wind and brass players violated Section 8(a)(5) and (1) of the Act, as alleged.

## ORDER[15]

The Respondent, Colorado Symphony Association, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish Denver Musicians Association, Local 20-623, American Federation of Musicians with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the Respondent's unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the requested individual overscale contracts executed by the Respondent and all principal wind and brass players for the 2014/15, 2015/16, and 2016/17 seasons.

(b) Within 14 days after service by the Region, post at its facility in Denver, Colorado copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, Respondent has gone out of business or closed the facility involved in this proceeding, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since January 16, 2017.

[14] There are also two other arguable problems with the Symphony's waiver defense. First, as the Symphony acknowledges, article 16 is a permissive subject of bargaining. Thus, the Union was free to unilaterally rescind or repudiate it. *KFMB Stations*, 343 NLRB at 752. Second a waiver of bargaining rights under a management-rights clause does not survive the expiration of the agreement, absent evidence that the waiver was intended to survive. *American National Red Cross*, 364 NLRB No. 98, slip op. at 4 (2016). However, neither the General Counsel nor the Union makes these arguments.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 20, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to furnish Denver Musicians Association Local 20-623, American Federation of Musicians, with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL furnish to the Union in a timely manner the requested individual overscale contracts we executed with all principal wind and brass players for the 2014/15, 2015/16, and 2016/17 seasons.

COLORADO SYMPHONY ASSOCIATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-195026 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.